

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re Applications of)	MM Docket No. 93-107
DAVID A. RINGER)	File No. BPH-911230MA
ASF BROADCASTING CORPORATION)	File No. BPH-911230MB
WILBURN INDUSTRIES, INC.)	File No. BPH-911230MC
SHELLEE F. DAVIS)	File No. BPH-911231MA
OHIO RADIO ASSOCIATES, INC.)	File No. BPH-911231MC

For Construction Permit
For New FM Radio Station at
Westerville, Ohio

To: Administrative Law Judge
Walter C. Miller

REPLY TO OPPOSITION

Wilburn Industries, Inc. ("Wilburn"), by its attorneys,
hereby submits its Reply to the Opposition to Motion to Enlarge
Issues filed by Shellee F. Davis ("Davis") on September 8, 1993,
stating as follows:

A. Introduction.

In its Petition to Enlarge Issues against Davis, Wilburn
established, through Davis's own deposition testimony, that she
had predicated her certification of financial qualifications upon
nothing more than an "accommodation letter" from a local banker
of her acquaintance who hoped to do business with her in the

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future. Specifically, Wilburn showed that Davis had not shown (or discussed) a business plan or budget with the banker, had not discussed the value or potential profitability of the station, and had failed to learn even what the bank's credit criteria would be or what collateral might be required for the hypothetical loan in question.^{1/} Indeed, she did not know -- and made no effort to find out -- what "intangible assets" might be necessary to pledge as security for such a loan when such a condition was set forth in the letter. She also explicitly testified that she had not agreed to pledge her personal assets if, as indicated by the letter, they were required as collateral. Finally, Wilburn pointed out that the bank letter proposed to rely on station assets to secure the loan, although Davis intended to lease her production and transmission facilities, and that the amount of the loan exceeded her net worth. In short, Davis supplied none of the information which the Commission has recognized that a bank requires before it can agree to make a loan to a new business enterprise. When the bank which presently handles her business account did ask for such information, she chose not to pursue the matter with such bank.

^{1/} To the extent that the bank identified such criteria, such as a satisfactory staffing plan, Davis provided no information with respect to such criteria.

B. Argument.

The Opposition submitted by Davis does not satisfy the substantial questions raised by Wilburn. Rather, it reinforces the necessity for further inquiry into such matters. Thus, Davis essentially concedes all of the facts alleged by Wilburn: she had no substantive discussion with the banker, Ralph Frasier, about her business plans, about the value of the proposed business, or about any other factor which a bank must review before it will make a substantial loan to a new business enterprise. Indeed, in the Declaration submitted with Davis's Opposition, Frasier again states that a loan will be made to Davis if "all reasonable and ordinary credit criteria are met,"^{2/} but once again fails to identify such criteria, fails to indicate that he and Davis ever discussed such matters, and fails to confirm that she at this point has satisfied such criteria. The Commission has recognized that, obviously, many applicants can obtain a letter saying that they will receive a loan if they later satisfy the bank's credit criteria. It also has held that such letters are essentially meaningless. What instead is required is a meaningful dialogue between the bank and the prospective borrower, an understanding of what credit criteria the bank may have, and a preliminary conclusion that the borrower can satisfy such criteria. This process still has not taken place in the case of Davis and Frasier.

^{2/} Opposition, Attachment 1, page 2.

To the extent Frasier's Declaration does address other matters which may be relevant to the requested issue, it is no more than a vague and conclusory recitation with no evidentiary value. Although he may have had a long-term banking relationship with her, Davis already has revealed that it did not concern her business or a primary personal account. He fails to explain, therefore, how that relationship has made him "well acquainted" with her financial status above and beyond the information contained in the single financial statement she supplied just before he wrote the requested letter. Similarly, he may be generally familiar with the "success of her past business," her "track record," and her "standing and reputation," but he fails to base any of his conclusions on anything more than a general impression. Davis certainly did not provide him with any financial information which would substantiate these general, vague beliefs, and it is virtually inconceivable that a bank would make a substantial loan based on nothing more than such an unsupported belief, with no examination of the usual hard financial data. That is, Frasier has provided a statement which, in essence, contains nothing more than the general recitations contained in the magazine articles Davis introduced at hearing. No reasonable banker would make a loan based only on such reports and without reference to the information which it must have in hand before concluding that its "reasonable and ordinary credit criteria are met." Finally, Frasier states that the financial

statement supplied by Davis was "reviewed with a seasoned loan officer" but, once again, he does not reveal what Frasier and that officer discussed and what that "review" entailed. The only thing certain is that the officer did not review Davis's proposal in light of the bank's "reasonable and ordinary credit criteria," because he had none of the information required for such review. Simply put, Frasier has merely confirmed that he would not necessarily give an "accommodation letter" to just anyone, but that he did provide one to Davis in this instance.^{3/}

The legal arguments included in Davis's Opposition are as weak as the Frasier Declaration. For example, Davis cites Scioto Broadcasters, 5 FCC Rcd 5158 (Rev. Bd. 1990), as establishing that her bank letter is valid because she "has an established long-term banking relationship with the lending institution." Opposition, page 5. Yet, Scioto states that such relationship must be "sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data." 5 FCC Rcd at 5160. In this case, the only long-term relationship Davis has had with Frasier is as a depositor with a secondary personal account at his bank. The bank had -- and Davis provided -- none of the necessary information, either at the time she met with Frasier or at any

^{3/} Frasier's Declaration also recites that his earlier letter was not false. (Opposition, Attachment 1, pages 1, 3.) Wilburn has not suggested that his letter was false, only that his letter was misused by Davis.

prior time. Where a bank (i.e. BancOhio) did have such knowledge based on a long-term business relationship, her request for a letter was turned down until such time as she satisfied the bank's credit criteria. However, she chose not to pursue the matter with her regular banker.^{4/}

Likewise, and contrary to the claim advanced in Davis's Opposition, Davis has not established that she "provided the bank with financial data upon which the bank could review the loan request, that the bank did so, and the bank is satisfied with the data," as required by A.P. Walter, Jr., 6 FCC Rcd 875 (Rev. Bd. 1991). To the contrary, the bank's credit criteria were not identified by Frasier either in his discussions with Davis or in the Declaration submitted with her Opposition, the ordinary financial data required in connection with the evaluation of a loan request in light of such criteria were not supplied to the bank by Davis, and the bank has never stated that it already has evaluated her prospective loan in light of such data and its credit criteria.

Davis also is wrong when she argues that the scanty information she supplied to the bank and the letter she obtained show that the bank had given her a meaningful commitment despite

^{4/} For this reason, examination of the banker who turned down her request, as well as the one who gave her the accommodation letter she wanted, is required in discovery.

the absence of any substantive discussions and the failure to evaluate her plans in light of the bank's credit criteria. Thus, all of her convoluted argumentation does not obviate the facts that adequate collateral, (which, arguendo, might justify a loan in the absence of other data), does not exist in this instance. Although the bank letter mechanically recites that the station equipment would be used to secure the loan, Davis intends to lease such equipment; although the letter recites that the station's intangible assets also would be used to secure the loan, Davis had no firm understanding of what such assets might be; and although the letter recites that her personal assets would be used to secure the loan, the amount of the loan would exceed the net worth shown on her financial statement. Davis's argument that a bank would commit to a loan in these circumstances, when she had not even discussed her business plan, budget, estimated revenues, or the bank's credit criteria, is ridiculous. As stated in the cases cited by Davis, an issue therefore is warranted where, as here, the bank letter fails to reflect "sufficient dialogue" between the applicant and the bank, and no "ordinary loan request documentation and data" was supplied by the applicant or reviewed by the bank. See Liberty Communications, 8 FCC Rcd 4264 (1993); Annette B. Godwin 8 FCC Rcd 4098 (Rev. Bd. 1993).^{5/}

^{5/} In this regard, Davis contends that the financial statement she supplied to the bank understated her net worth, because it did not reflect the value of Britt Business Systems. However, the bank was not supplied
(continued...)

Finally, Wilburn pointed out that an applicant cannot rely on a bank letter when it has not agreed to supply the collateral required by the bank. Davis's testimony, that she had not agreed to secure the loan with her personal property, and may not agree to do so in the future, was clear and unequivocal. Davis's response consists of nothing but word games. First, Davis contends that she never said that the bank's requirement (i.e. that she personally guarantee the loan) was "unacceptable". Opposition, page 8. The argument evades the point: she had to affirmatively agree to meet such condition, and this she declined to do at the time she obtained the letter and through the time of her deposition. Second, Davis claims that when she testified that she would have to later decide whether she would secure the loan with her personal property, this referred only to "personal property (such as her home)" and not to other "alternative property" to secure her personal commitment. Opposition, page 8.

^{5/} (...continued)

with any information about Britt, so that Wilburn's initial point (i.e. that the balance sheet reviewed by the bank reflected a total net worth which was less than the amount of the loan) remains accurate. Notably, there also is no indication that Frasier was aware of the value or income of Britt. More significantly, there is no indication that Frasier is aware that Davis plans to terminate her association with Britt upon grant of a permit, so that the bank could not rely upon that asset in the event of a default. As demonstrated at hearing, Davis has no idea what the business is worth or for what price she might be able to sell it, while the agreements with her suppliers reveal that she has no authority to assign the agreements to a third party if a buyer can be found.

This argument is disingenuous to the point of lacking candor: There is nothing in the plain response given in her deposition which would indicate that her use of the term "personal property" meant only some of her property, while some other personal assets called "alternative property" might instead be used. Indeed, that claim is nonsense. Any "alternative property" she may own also is her "personal" property, as she well knows.

C. Conclusion.

Davis's deposition testimony was clear and unequivocal -- and established that she obtained no more than an accommodation letter from Huntington Bank's Ralph Frasier. Frasier's Declaration confirms that the bank has yet to be supplied with the data necessary to evaluate a loan request in light of its reasonable and ordinary credit criteria. To the extent that he is aware of Mr. Davis's past record and future plans, he has nothing more than vague idea of her general reputation in the business community. Davis's legal arguments, that she gave him all information which the Commission deems necessary -- i.e., a financial statement which she now says was incomplete -- and that the bank in turn has evaluated her qualifications to the extent required by Commission precedent, are incorrect. When confronted with her own statements concerning her readiness to provide a personal guarantee, she plays word games and advances patently

incredible interpretations. For each of these reasons, the requested issues must be specified.

Respectfully submitted,

By:



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Dated: September 20, 1993

CERTIFICATE OF SERVICE

I, Tracy A. Holden, a secretary in the law firm of Brown, Nietert & Kaufman, Chartered, do hereby certify that on this 20th day of September, 1993, I caused copies of the foregoing "Reply to Opposition" to be delivered by first class mail, postage prepaid, to the person named below:

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